Supreme Court rule, it may possibly be justified on the ground that the warranty was not as to a fact absolutely certain, but as to a matter of opinion, in which the insured should be held only to good faith.

PRACTICE—LAW OF THE CASE—MATTERS CONCLUDED BY A DECISION OF APPELLATE COURT.—The United States Supreme Court reversed a judgment for the plaintiff on the ground that, in rendering it, the Missouri court disregarded a judgment of a Connecticut Court which had held an insurance assessment valid. The Missouri court, upon reconsideration of the case, resolved that the Supreme Court had left untouched any consideration of the elements constituting the assessment and decided that a tax imposed by the laws of Missouri had been unlawfully included in the assessment, which was therefore void. The question was whether the state court proceeded in consonance with the decision of the Supreme Court. The defendant contended that the effect of the inclusion of the tax was presented to the Supreme Court, and that, by its decision, the state court was precluded from passing upon the validity of the inclusion of the tax in the assessment. *Held,* that the inclusion of the tax not having been discussed in the former decision, the state court was not precluded from passing on the question, as omissions do not constitute a part of a decision and become the law of the case. Holmes, Van Devanter, and McReynolds, J.J., *dissenting. Hartford Life Ins. Co. v. Blincoe* (1921) 41 Sup. Ct. 276.

When a question arising in the course of litigation has been determined by an appellate court, it cannot, after remand, be raised again and relitigated in the lower court. Black, *Law of Judicial Precedents* (1912) secs. 81, 83; 4 C. J. 1215; but see (1920) 29 YALE LAW JOURNAL, 568. The effect of a decision, as the law of the case, is restricted to propositions of law actually decided, and such points as are necessarily determined by the decision. *Parkin v. Grayson-Owen Co.* (1914) 25 Calif. App. 269, 143 Pac. 257. Where the judgment actually rendered could not have been given without deciding a particular question in a particular way, the decision of it is necessarily implied, although it was not expressly mentioned. *McKinney v. State* (1889) 117 Ind. 26, 19 N. E. 613. Some courts hold that, for a decision to be conclusive, the question involved must have been presented to the court as necessary to a decision in the case, and directly considered and decided, and that parties should not be concluded upon questions that are decided by mere implication arising from the general disposition of a case. *Gwin v. Waggoner* (1893) 116 Mo. 143, 22 S. W. 710. The principal case seems to hold that a decision is conclusive, as an adjudication, only as to those questions consciously before the court. This seems to be the better view, for it is often difficult to ascertain what is necessarily determined by a decision.

PROPERTY—FUTURE INTERESTS—RULE IN SHELLEY'S CASE—A conveyance was made to one Goode, "and after his death to the heirs of his body, their heirs and assigns forever." Goode, after birth of issue, sold to the defendants. The plaintiffs claimed as heirs of the body of Goode. *Held,* that Goode had but a life estate, the rule in Shelley's Case not applying, and that the plaintiffs should take as remaindermen. *Blythe v. Goode* (1920, C. C. A. 4th) 269 Fed. 544.

The rule in Shelley's Case applies where, after a life estate, a remainder is limited to the life-tenant's heirs, or to the heirs of his body, making such a remainder take effect by descent and giving an inheritable interest to the life tenant. But heirs or heirs of the body must be used technically to mean an indefinite succession of the life tenant's issue; and a preliminary question is always raised as to whether the words used mean such indefinite succession or designate particular persons at the death of the life tenant, who may now be the source of the line of descent. In *Archer's Case,* which started this trend of decisions, it was decided that a limitation to R. A. and after to the next heir

male, and to the heirs male of the body of such heir male, did not come within the rule. (1599 C. P.) Coke, Pt. I, 66b. In England this interpretation has been generally limited, due to the fact that at the death of the life tenant there can be but one heir, to cases where the word "heir" is used in the singular, "heirs" necessarily signifying successive generations. *Wright v. Pearson* (1758, Ch.) 1 Amb. 358. Although a slight change in wording may affect the interpretation of the intention of the grantor or testator, so that each case must be decided independently, some general conclusions can be drawn. Where the remainder is to the heirs of the life tenant, their heirs and assigns, by the weight of authority, an indefinite succession is meant and the rule applies. *Harrison v. Harris* (1914) 245 Pa. 397, 91 Atl. 617; *Ryan v. Ryan* (1919) 138 Ark. 362, 211 S. W. 183. Words of similar import have a like effect; a remainder to the heir "forever" or "in fee" gives a fee to the life tenant. *Silcocks v. Silcocks* [1916] 2 Ch. 161; *Stathers v. Renz* (1916) 251 Pa. 315, 96 Atl. 717. "In fee simple and forever" is interpreted in the same way. *Roberson v. Moore* (1915) 168 N. C. 388, 84 S. E. 351. But a remainder to the "heirs" (in the United States) or "heir" (in England) "absolutely" has been held not within Shelley's rule. *Westcott v. Meeker* (1909) 144 Iowa, 311, 122 N. W. 964; *In re Hussy and Green's Contract* (1921, Ch.) 37 T. L. R. 407. Where the course of descent is changed, as where the remainder is limited to the life tenant's bodily heirs and their heirs general, Shelley's Case is usually held not to apply. "Heirs of the body, their heirs and assigns," as in the instant case, makes "heirs of the body" words of purchase. *Aetna Life Ins. Co. v. Hoppin* (1914, C. C. A. 7th) 214 Fed. 928. A similar interpretation is given to a remainder to heirs of the body in fee simple. *Benson v. Tanner* (1917) 276 Ill. 594, 115 N. E. 191; *contra, Burton v. Carnahan* (1906) 38 Ind. App. 612, 78 N. E. 682. See 29 L. R. A. (N. S.) 963, note.

SURETYSHIP—CONTRACTOR'S BOND—PAYMENTS TO MATERIALMAN AS RELEASE OF SURETY.—The defendant surety company gave a bond to secure the faithful performance of a building contract. Although not parties to the bond, the materialmen were expressly protected by its terms. This action was brought to recover $15,790.13 for material furnished on the job by the plaintiff company, although it admitted having received more than that amount from the contractor while the building was being erected. The plaintiff knew the source of at least part of the funds from which these payments were made, and applied them to previous debts of the contractor. The plaintiff was also in a position to file a lien on a building fund of $15,000 which had been set aside by the owner, but failed to do so until after $10,000 had been withdrawn. *Held,* that the plaintiff could not recover. *Alexander Lumber Co. v. Aetna Accident & Liability Co.* (1921, Ill.) 129 N. E. 871.

According to the general rule, a debtor and creditor have the privilege and power of determining the application of a payment regardless of the interests of third parties, such as sureties. *Wyandotte Coal Co. v. Wyandotte Paving Co.* (1916) 97 Kan. 203, 154 Pac. 1012; *Irving v. Mutual Trust Co.* (1914) 82 N. J. Eq. 629, 90 Atl. 274. There are, however, several recognized exceptions. See 3 Williston, *Contracts* (1920) sec. 1804. The authorities are in conflict as to whether the facts of the instant case come within one of such exceptions. It has been held that under such circumstances, the surety is discharged. *Columbia Digger Co. v. Sparks* (1915, C. C. A. 9th) 227 Fed. 780; *Bross v. McNicholas* (1913) 66 Ore. 42, 133 Pac. 782; but see *contra, Chicago Lumber Co. v. Douglas* (1913) 89 Kan. 308, 131 Pac. 563; *People v. Powers* (1896) 108 Mich. 339, 66 N. W. 215. In analogous cases, where money has been received from a tax collector by a municipality, in ignorance of the source from which it was derived, the authorities seem to be uniform in holding that such money can be applied to previous indebtedness, due to default, though detrimental to